

# Permanency Planning Hearings

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## 17.1 Purpose of Permanency Planning Hearings

Permanency planning hearings are conducted to review the progress being made toward returning home a child in foster care, or to show why the child should not be made a permanent court ward. MCL 712A.19a(2); MSA 27.3178(598.19a)(2).

The court rule stating the purpose of permanency planning hearings, MCR 5.973(C)(1), provides that the court must conduct a “post-disposition” permanency planning hearing when a child who is under the court’s jurisdiction remains in foster care “for an extended time” without parental rights being terminated. The statute governing permanency planning hearings, MCL 712A.19a; MSA 27.3178(598.19a), was amended in 1997 to require a court to conduct a permanency planning hearing “not more than 364 days after an original petition has been filed.” MCL 712A.19a(1); MSA 27.3178(598.19a)(1), as amended by 1997 PA 163.\*

The purpose of a permanency planning hearing is to decide whether to:

- F return the child home;\*
- F continue the child’s foster care placement on a short-term or long-term basis; or

\*See Section 17.2, below, for a detailed discussion of time requirements for permanency planning hearings.

\*See Form JC 64.

\*See Section 17.10, below, for a detailed discussion of the court's options.

- F if the agency fails to demonstrate that termination of parental rights is clearly not in the child's best interest, initiate proceedings to terminate parental rights.

MCR 5.973(C)(1).\*

The child's supervising agency is required to strive to achieve a permanent placement for the child, including either a safe return to the child's home or implementation of an alternative permanency plan, within 12 months after the child is removed from his or her home. This 12-month goal shall not be extended or delayed for reasons such as a change or transfer of staff or worker at the supervising agency. MCL 722.954b(1); MSA 25.359(4b)(1).

The child's supervising agency must require its worker to visit at least monthly the home or facility in which the child is placed, and to monitor and assess in-home visitation between the child and his or her parents. MCL 722.954b(3); MSA 25.359(4b)(3).

"Supervising agency" means the Family Independence Agency if the child is placed in the FIA's care for foster care, or a child placing agency in whose care a child is placed for foster care. MCL 722.952(1); MSA 25.359(2)(1).

## 17.2 Time Requirements

The court must conduct a permanency planning hearing not more than 364 days after an original petition has been filed. MCL 712A.19a(1); MSA 27.3178(598.19a)(1).

**Note:** The court rule governing time requirements for permanency planning hearings, MCR 5.973(C)(2), provides that the court must conduct a permanency planning hearing no later than 364 days *after entry of the original order of disposition*. The statute governing permanency planning hearings, MCL 712A.19a; MSA 27.3178(598.19a), was amended in 1997 to require a court to conduct a permanency planning hearing "not more than 364 days *after an original petition has been filed*." MCL 712A.19a(1); MSA 27.3178(598.19a)(1), as amended by 1997 PA 163 (emphasis added). The court rule has not been amended to conform to the statutory amendment.

Because under the new statutory time requirement a court has discretion to conduct a permanency planning hearing "not more than" 364 days after the filing of the petition, a permanency planning hearing could, in some circumstances and in the court's discretion, be held prior to the initial dispositional hearing.

Unless the child is subject to a “permanent foster family agreement” or is placed with a relative in a placement intended to be permanent, the court must conduct review hearings every 91 days after the initial permanency planning hearing, as long as the child remains subject to the jurisdiction, control, or supervision of the court, the Michigan Children’s Institute, or another agency. MCL 712A.19a(1); MSA 27.3178(598.19a)(1).\*

If a child is in a “permanent foster family agreement” or is placed with a relative in a placement intended to be permanent,\* the court must hold review hearings not more than 182 days following a permanency planning hearing and every 182 days thereafter, as long as the child remains subject to the jurisdiction, control, or supervision of the court, Michigan Children’s Institute, or other agency. MCL 712A.19(4); MSA 27.3178(598.19)(4).

A permanency planning hearing may be combined with a dispositional review hearing. MCL 712A.19a(1); MSA 27.3178(598.19a)(1), and MCR 5.973(C)(2).\*

### 17.3 Notice Requirements

Prior to a permanency planning hearing, the court must ensure that the following persons are notified in writing:

- F the agency responsible for the care and supervision of the child, which shall advise the child of the hearing if the child is 11 years of age or older;
- F the foster parent or custodian of the child;
- F if parental rights have not been terminated, the parents of the child;
- F the guardian of the child;
- F the guardian ad litem of the child;
- F the elected leader of the Indian tribe (if tribal affiliation has been determined);
- F the attorney for the child, the attorneys for each party, and the prosecuting attorney (if she or he has appeared);
- F the child (if 11 years of age or older); and
- F other persons as the court may direct.

MCL 712A.19a(3)(a)–(i); MSA 27.3178(598.19a)(3)(a)–(i), MCR 5.921(B)(2)(a)–(k), MCR 5.921(B)(3), and MCR 5.973(C)(3).

\*MCR 5.973(C)(2) requires subsequent permanency planning hearings only every 364 days.

\*See Section 13.24(C) for a discussion of these alternative placement options.

\*See Chapter 16, Parts I–III, for a detailed discussion of dispositional review hearings. If the hearings are combined, consult the notice requirements in Section 17.3, below.

**Note:** The court is required to appoint a “lawyer-guardian ad litem” for the child. In some circumstances, the court may also appoint an “attorney,” and/or a “guardian ad litem.” See MCL 712A.13a(1)(b), (e), and (f); MSA 27.3178(598.13a)(1)(b), (e), and (f). For purposes of a required notice, “attorney” includes “lawyer-guardians ad litem.” The appointment of counsel for a child is discussed in detail in Sections 7.10–7.13.

\*This requirement is effective March 1, 1999. 1998 PA 479. See Sections 13.18 and 13.20 for a detailed discussion.

If a child is placed outside of his or her home, and if a physician has diagnosed the child’s abuse or neglect as involving failure to thrive, Munchausen Syndrome by Proxy, Shaken Baby Syndrome, a bone fracture that is diagnosed as a result of abuse or neglect, or drug exposure, the court must allow the child’s attending or primary care physician to testify regarding the Case Service Plan at a judicial proceeding to determine if the child is to be returned home, which includes a permanency planning hearing. MCL 712A.18f(6)–(7); MSA 27.3178(598.18f)(6)–(7). The court must notify each physician of the time and place of the hearing.\*

\*Form JC 45 meets these requirements.

Notice of a permanency planning hearing must be given in writing at least 14 days before the hearing. The notice must include a brief statement of the purpose of the hearing and notice that the hearing may result in further proceedings to terminate parental rights. MCR 5.920(C)(3)(a), MCR 5.973(C)(3), and MCL 712A.19a(3); MSA 27.3178(598.19a)(3).\*

## 17.4 Referees Who May Conduct Permanency Planning Hearings

Unless a party has demanded a *trial* by judge or jury, a referee may conduct the trial and further proceedings through the dispositional phase. MCR 5.913(B). The court may assign a referee to conduct a permanency planning hearing and to make recommended findings and conclusions. MCR 5.913(A)(1). A referee who conducts a permanency planning hearing must be licensed to practice law in Michigan. MCR 5.913(A)(3).

Referees may administer oaths and examine witnesses, and, if a case requires a hearing and taking of testimony, the referee must make a written signed report to the judge containing a summary of the testimony taken and a recommendation for the court’s findings and disposition. MCL 712A.10(1)(b)–(c); MSA 27.3178(598.10)(1)(b)–(c). Referees do not have authority to enter orders.

## 17.5 Appointment of Attorney for Respondent

\*See Section 7.9, for a more detailed discussion.

If the respondent is not represented by an attorney, the respondent may request and receive a court-appointed attorney at a permanency planning hearing. See MCR 5.915(B)(1)(a)(ii) and MCL 712A.17c(4)(a)–(c); MSA 27.3178(598.17c)(4)(a)–(c).\*

## 17.6 Appearance of Lawyer-Guardian Ad Litem for Child

The court must appoint a lawyer-guardian ad litem to represent the child, and the child may not waive the assistance of a lawyer-guardian ad litem. MCL 712A.17c(7); MSA 27.3178(598.17c)(7). MCL 712A.17d(1)(g); MSA 27.3178(598.17d)(1)(g), provides that the lawyer-guardian ad litem must attend all hearings, including permanency planning hearings, and substitute representation for the child only with court approval.\*

\*See Sections 7.10–7.11 for a detailed discussion of the powers and duties of lawyer-guardians ad litem.

## 17.7 Appointment of Guardians Ad Litem\*

The court may appoint a guardian ad litem for the child. MCL 712A.17c(10); MSA 27.3178(598.17c)(10). In addition, if the court finds that the welfare of a party requires it, the court may appoint a guardian ad litem for that party. MCR 5.916(A).

\*See Section 7.13 for a detailed discussion.

## 17.8 Appearance of Prosecuting Attorney

If the court requests, the prosecuting attorney must appear at any proceeding. MCR 5.914(A).\*

\*See Section 7.14, for a more detailed discussion.

## 17.9 Required Procedures and Rules of Evidence at Permanency Planning Hearings

All relevant and material evidence, including oral and written reports, may be received by the court and relied upon to the extent of its probative value, even though such evidence may not be admissible at trial. MCR 5.973(C)(4)(a). The parties may challenge the weight to be given written reports, especially since such reports generally contain “hearsay within hearsay.” See Sections 11.6(F) and 11.6(G).

Neither the court nor another party to the case may call a lawyer-guardian ad litem as a witness to testify regarding matters related to the case. MCL 712A.17d(3); MSA 27.3178(598.17d)(3).\*

\*This rule is effective March 1, 1999. 1998 PA 480. See Section 7.11 (powers and duties of lawyer-guardians ad litem).

### A. Information That the Court Must Consider

The court must consider any written or oral information concerning the child from the child’s parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, or guardian ad litem, and any other evidence offered at the hearing, including evidence bearing on the appropriateness of parenting time. MCR 5.973(C)(4)(a) and MCL 712A.19a(7); MSA 27.3178(598.19a)(7). Although not required by the statute or court rule, the court may consider any information or evidence offered by the child’s lawyer-guardian ad litem and attorney, if a “child’s attorney” has been appointed.

\*This requirement is effective March 1, 1999. 1998 PA 479. See Sections 13.18 and 13.20 for a detailed discussion.

If a child is placed outside of his or her home, and if a physician has diagnosed the child's abuse or neglect as involving failure to thrive, Munchausen Syndrome by Proxy, Shaken Baby Syndrome, a bone fracture that is diagnosed as a result of abuse or neglect, or drug exposure, the court must allow the child's attending or primary care physician to testify regarding the Case Service Plan at a permanency planning hearing. MCL 712A.18f(6)–(7); MSA 27.3178(598.18f)(6)–(7).\*

## B. Opportunity to Controvert Written Reports

The parties must be afforded an opportunity to examine and controvert written reports received, and the parties may be allowed to cross-examine the persons who made the reports when they are reasonably available. MCR 5.973(C)(4)(a).

**Note:** It may avoid delay to require the petitioner to list evidence that will be tendered by written report, and to provide that list to the attorneys for the respondent and child. If either attorney wants to cross-examine the author of a report, that attorney may subpoena him or her.

## 17.10 Court's Options Following Permanency Planning Hearings

### A. First Decision: Determine Whether to Return Child Home

\*See Section 13.19 for a detailed discussion of Case Service Plans.

Unless the court determines that it would cause a substantial risk of harm to the life, physical health, or mental well-being of the child, the court must return the child home. The failure of the parent to substantially comply with the Case Service Plan\* is evidence that returning the child home would cause a substantial risk of harm to the child's life, physical health, or mental well-being. MCR 5.973(C)(4)(b) and MCL 712A.19a(4); MSA 27.3178(598.19a)(4). See *In re Dahms*, 187 Mich App 644, 645 (1991), and *In the Matter of Mason*, 140 Mich App 734, 737–38 (1985) (non-compliance with treatment plan does not alone support termination of parental rights).

In addition, the court must consider any condition or circumstance that may be evidence that returning the child home would cause a substantial risk of harm to the child's life, physical health, or mental well-being. MCR 5.973(C)(4)(b) and MCL 712A.19a(4); MSA 27.3178(598.19a)(4).

### B. Second Decision: Determine Whether to Initiate Proceedings to Terminate Parental Rights

If the child is not to be returned home, the court must order that the child's foster care placement continue. The court must also order the Family

Independence Agency to initiate proceedings to terminate parental rights within 42 days, unless the court finds at the permanency planning hearing that termination of parental rights is clearly not in the best interest of the child at the present time. MCL 712A.19a(5); MSA 27.3178(598.19a)(5), and MCR 5.973(C)(4)(c). The FIA has the burden of demonstrating that termination of parental rights is clearly not in the child's best interests. MCL 712A.19a(6); MSA 27.3178(598.19a)(6).

However, there is no sanction for the failure to initiate termination proceedings within the requisite 42 days. *In re Kirkwood*, 187 Mich App 542, 545–46 (1991).

### C. Third Decision: Determine Whether to Continue Child's Foster Care Placement for a Limited Period

If the Family Independence Agency demonstrates that termination of parental rights at the present time is clearly not in the child's best interest, the court must either:

- F continue the child's foster care placement for a limited time if the court finds that permanent placement is not possible, or
- F continue the child's foster care placement on a long-term basis if the court finds that that is in the child's best interest.

MCR 5.973(C)(4)(d) and MCL 712A.19a(6)(a)–(b); MSA 27.3178(598.19a)(6)(a)–(b).

**Note:** “Although not desirable in most cases, long-term foster care may be the only expedient option in three common situations. Sometimes a child must remain with a foster parent on a permanent basis because adoption is not appropriate. In this situation, the court should specify that this is to be a permanent arrangement. A court order can discourage subsequent revocation of this understanding by either the foster parents or the court. [See Section 13.24(C) for discussion of foster care placements, including “permanent foster family agreements” and relative placements intended to be permanent.]

“A second type of situation is that the child cannot function in a family setting. In this case, the court should identify the reasons for long-term foster care outside a family (such as in a group home or institution). The court should also state the estimated length of the placement and, when possible, should approve a plan to help the child become able to function in a family setting.

“A third situation necessitating long-term care is as part of a transitional living situation to prepare a young person for adulthood. The court should set forth why a transitional living situation is needed. The court should examine why long-term foster care is the most appropriate way of preparing the young person for adulthood and maintaining family ties after the young person has further matured.” National Council of Juvenile and Family Court Judges, *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases* (Reno: University of Nevada, Reno), 1995, pp 81–82.

